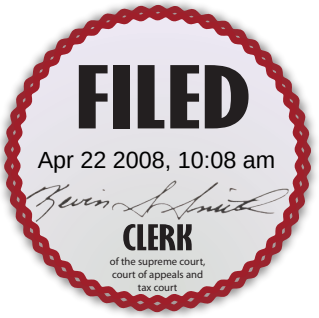

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IN THE COURT OF APPEALS OF INDIANA

BRIAN D. BURNS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0704-CR-220
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Commissioner
Cause No. 49G05-0111-PC-221661

April 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Brian Burns appeals the revocation of his probation. Burns raises one issue, which we restate as whether the evidence is sufficient to support the revocation of his probation. We affirm.

The facts most favorable to the probation revocation follow. On April 19, 2002, Burns pleaded guilty to two counts of robbery as class B felonies. On May 17, 2002, the trial court sentenced Burns to eight years with two years suspended for each count. The trial court ordered that the sentences be served concurrently.

On October 11, 2006, at 8:50 a.m., Indianapolis Police Officer Paul Wilson noticed Burns walking between two buildings. Burns glanced over his shoulder and looked in Officer Wilson's direction. Officer Wilson watched Burns walk between the two buildings until Burns disappeared from Officer Wilson's view. Officer Wilson drove to a nearby intersection and saw Burns running southbound and taking off a large black coat. Officer Wilson drove westbound on 35th Street and saw Burns running between houses. Officer Wilson activated the red and blue emergency lights in his marked police vehicle and traveled southbound on North Illinois Street. Officer Wilson followed Burns into a lot. Burns jumped onto a chain link fence, and Officer Wilson got out of his vehicle. Officer Wilson, who was in uniform, yelled, "police, stop" at Burns, who was seven feet away from Officer Wilson. Burns went over the fence and "head first down the other side down into some bushes," picked himself up, and looked at Officer Wilson. Transcript at 25. Officer Wilson told Burns to stop, but Burns began running. Officer Wilson returned to his vehicle and drove south on Illinois Street with his emergency

lights activated. After another police officer arrived at the scene, Burns stopped running because he was tired.

After Officer Wilson apprehended Burns, Burns refused to tell the police his identity. At police headquarters, Burns refused to be fingerprinted. Burns formed a fist and refused Indianapolis Police Officer Christopher Cavanaugh's orders to give up his hands for a fingerprint. After using mandibular manipulation, "a pain compliance technique," Burns complied with the fingerprinting.

On October 17, 2006, the State filed an amended notice of probation violation under cause number 49G05-0111-CF-221661 ("Cause #661"), which alleged that Burns had been arrested and charged with two counts of resisting law enforcement as class A misdemeanors under cause number 49G05-0610-CM-195787 ("Cause #787").[1]

On March 19, 2007, the trial court held a hearing on the allegation of probation violations in cause number Cause #661 and a bench trial on the charges in Cause #787. Specifically, the trial court stated, "49G04-0610CM-195787, State of Indiana versus Brian Burns. Mr. Burns is present in person and by counsel, Mr. Lopes, State by Ms.

[1] On September 29, 2006, the State filed a notice of probation violation, which alleged that Burns failed to: provide a valid address to the Probation Department; comply with his court ordered mental health treatment; comply with his court ordered financial obligation; report for a urine screen as instructed on September 14, 2006. On October 4, 2006, the State filed an amended notice of probation violation, which additionally alleged that Burns failed to report to the Probation Department as instructed.

Douglass. This matter comes on for court trial. We are also tracking probation violation under cause 49G05-011-PC22161."[2] Transcript at 18.

After the consolidated hearing and bench trial, the trial court found Burns guilty of the first count of resisting law enforcement as a class A misdemeanor and not guilty of the second count because the events for the second count were a continuation of the events in the first count. The trial court sentenced Burns to 320 days for this conviction. The trial court then found that the conviction under Cause #787 constituted prima facie evidence of a violation of probation, revoked Burns's probation, and ordered Burns to serve two years.

Initially, we note that Burns challenges the sufficiency of the evidence of his conviction for resisting law enforcement and "requests this court to reverse his conviction for resisting law enforcement." Appellant's Brief at 11. The State argues that "[b]ecause this appeal only pertains to [Burns]'s probation revocation and not to his resisting law enforcement conviction, this Court should disregard Defendant's argument regarding the sufficiency of the evidence." Appellee's Brief at 6. We agree with the State.

Here, the trial court appears to have consolidated the bench trial on two counts of resisting law enforcement as class A misdemeanors under Cause #787 with a hearing on

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[2] We note that the cause number referenced by the trial court for the probation violation, "49G05-011-PC22161," is slightly different from the actual cause number for the probation violation, 49G05-0111-PC-221661. Transcript at 18. It appears that the cause number referenced by the trial court is a misstatement or typographical error as the trial court later stated, "I'm going to order that Mr. Burns term of probation under cause 01221661 is revoked." Id. at 44.

the State's notice of probation violation under Cause #661.[3] The consolidation of the two matters in a single hearing does not indicate that the separate actions disappear and become one action. Rather, the two matters continue separately, and each record is that of an independent suit. See Bane v. State, 579 N.E.2d 1339, 1341 (Ind. Ct. App. 1991) (noting the three types of consolidation and holding that a consolidation of a sentencing on a murder conviction and the revocation of a probation was of the type in which the matters continue separately), trans. denied. Thus, to the extent that Burns requests this court to reverse his conviction for resisting law enforcement, we conclude that Burns failed to appeal that conviction, and we do not have jurisdiction to entertain Burns's request to reverse his conviction.[4] See Davis v. State, 771 N.E.2d 647, 648-649 (Ind. 2002) (where defendant filed notice of appeal after the thirty-day deadline of Ind.

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[3] At the January 3, 2007 hearing, the trial court stated, "This is State of Indiana versus Brian Burns, cause number 06195787. For some reason the file says it is set for a probation hearing when he is not on probation in that file. And we are also here on 01221661 which is also set for probation hearing where Mr. Burns was placed on probation out of this Court." Transcript at 11. At the March 19, 2007, consolidated bench trial and revocation hearing, the trial court stated, "49G04-0610CM-195787, State of Indiana versus Brian Burns. Mr. Burns is present in person and by counsel, Mr. Lopes, State by Ms. Douglass. This matter comes on for court trial. We are also tracking probation violation under cause 49G05-011-PC22161." Id. at 18. The chronological case summary for the probation revocation case under Cause #661 states "CASE TRACKING WITH [Cause # 787]," under the entry for the March 19, 2007 probation hearing.

[4] Burns's case summary reveals that he is appealing Cause #661, and does not indicate that he is appealing his conviction under Cause #787. Burns's case summary lists the nature of the case as "Criminal Law, Felony," and cites his convictions under Cause #661. Appellant's Case Summary at 2. The case summary also states, "Known related appeals: None." Id. at 3. The abstract of judgment contained in Burns's appendix only references Cause #661. Based on the record, we cannot say that Burns appealed his conviction for resisting law enforcement as a class A misdemeanor.

Appellate Rule 9, and Post Conviction Rule 2 did not apply, he forfeited his right to appeal, therefore the Court of Appeals lacked subject matter jurisdiction); Hancock v. State, 786 N.E.2d 1142, 1143-1144 (Ind. Ct. App. 2003) (holding that this court must dismiss an attempted appeal for lack of subject matter jurisdiction in the absence of a timely notice of appeal or Post-Conviction Rule 2 petition).

The sole issue is whether the evidence is sufficient to support the revocation of Burns's probation. Probation revocation is governed by Ind. Code § 35-38-2-3. A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999), reh'g denied. We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Id. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id. The violation of a single condition of probation is sufficient to revoke probation. Wilson v. State, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999).

The requirement that a probationer obey federal, state, and local laws is automatically a condition of probation by operation of law. Williams v. State, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998); Ind. Code § 35-38-2-1(b) ("If the person commits an additional crime, the court may revoke the probation."). "A criminal conviction is prima facie evidence of a violation and will alone support a revocation of probation." 695 N.E.2d at 1019. Here, the trial court found Burns guilty of resisting law

enforcement as a class A misdemeanor and then revoked Burns's probation on the basis of his conviction. Burns's conviction for resisting law enforcement as a class A misdemeanor is prima facie evidence of a violation. Burns attempts to challenge the conviction under the guise of appealing his probation revocation. By not having challenged the conviction on appeal, Burns cannot argue that the conviction was supported by insufficient evidence as a basis for challenging his revocation.[5] Based upon the conviction, the evidence is sufficient to support Burns's revocation. See, e.g., Williams v. State, 695 N.E.2d 1017, 1019 (Ind. Ct. App. 1998) (holding that evidence of probationer's conviction was sufficient to support revocation of his probation).

Notwithstanding his failure to challenge the resisting law enforcement conviction, we will address Burns's arguments. Burns argues that the trial court's determination that he violated his probation by committing the offense of resisting law enforcement is not supported by sufficient evidence. Specifically, Burns argues that his arrest was

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[5] Burns concedes that this court has held that "[a] criminal conviction established by proof beyond a reasonable doubt may appropriately be used to collaterally estop a defendant from relitigating the precise issue in subsequent proceedings." Sheron v. State, 682 N.E.2d 552, 553 (Ind. Ct. App. 1997) (relying on Kimberlin v. DeLong, 637 N.E.2d 121, 125 (Ind. 1994), reh'g denied, cert. denied, 516 U.S. 829, 116 S. Ct. 98 (1995)). In Sheron, the court held that "the State's use of Sheron's criminal convictions to prove his probation violation collaterally estops Sheron from relitigating the issues dispositive to the probation revocation proceedings under a standard of proof more favorable to the State." Id. Burns points to Kimberlin, in which the Indiana Supreme Court held: "Determining the appropriateness of offensive collateral estoppel involves two considerations: 1) whether the party in the prior action had a full and fair opportunity to litigate the issue and 2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case." Kimberlin, 637 N.E.2d at 125. Burns argues that "because the trial of the A misdemeanor was also the trial of the violation of probation, it would be manifestly unfair to estop Mr. Burns from challenging the sufficiency of the evidence." Appellant's Brief at 8. However, Burns does not argue that he did not have a full and fair opportunity to litigate the issue or appeal his conviction for resisting law enforcement as a class A misdemeanor. Thus,

"inappropriate" because Officer Wilson did not have reasonable suspicion to justify an investigatory stop. Appellant's Brief at 8.

The offense of resisting law enforcement is governed by Ind. Code § 35-44-3-3(a)(3) (Supp. 2006), which provides that "[a] person who knowingly or intentionally . . . flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop . . . commits resisting law enforcement, a Class A misdemeanor." "[T]his court has noted that Indiana Code Section 35-44-3-3(a)(3) does not condition the offense of resisting law enforcement upon a lawful order." Alspach v. State, 755 N.E.2d 209, 211 (Ind. Ct. App. 2001) (citing Corbin v. State, 568 N.E.2d 1064, 1065 (Ind. Ct. App. 1991); Lashley v. State, 745 N.E.2d 254, 261 (Ind. Ct. App. 2001), trans. denied), trans. denied. "In Indiana, an individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the officer's order."[6] Dandridge v. State, 810 N.E.2d 746, 749 (Ind. Ct. App. 2004). Because the lawfulness of an officer's order is immaterial to whether a defendant resisted arrest, we need not determine whether Officer Wilson had reasonable

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we do not find Burns's argument dispositive.

[6] Burns acknowledges the holdings in Dandridge and Lashley, but argues that their holdings are "in apparent conflict" with Bovie v. State, 760 N.E.2d 1195 (Ind. Ct. App. 2002). Appellant's Brief at 11. In Bovie, another panel of this court held that "before an individual may actually resist law enforcement by fleeing, the individual must have a duty to stop" and a person "could be found guilty of resisting law enforcement only if he was the subject of an otherwise legal stop." 760 N.E.2d at 1197-1198. To the extent that Bovie is in conflict with Alspach, Corbin, Lashley, and Dandridge, we decline to follow Bovie.

suspicion to stop Burns.[7] Thus, the revocation of Burns's probation is based upon sufficient evidence.

For the foregoing reasons, we affirm the revocation of Burns's probation.

Affirmed.

BARNES, J. and VAIDIK, J. concur

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[7] Accordingly, even to the extent that Burns is challenging the conviction itself, his argument fails.